Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

MICHAEL BUCKLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* RAIL LABOR EXECUTIVE ASSOCIATION

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Rail Labor Executives' Association (RLEA) is a voluntary, unincorporated association of the Chief Executive Officers of seven standard labor organizations which collectively represent operating, non-operating and shop craft employees of our nation's railroads. RLEA was formed in 1926, and has been the policy spokesperson for its affiliated organizations before Congress, the courts, administrative agencies and Executive Departments on matters that affect rail employees generally, including safety matters.

One area of concern to RLEA and its members has been the proper interpretation of the Federal Employers' Liability Act (FELA), because that Act is so vital to the safety of rail employees. Rail employees are not covered by state workers' compensation laws, but must look to the FELA to obtain redress for on-the-job injuries they suffer. Consequently, it is important to RLEA and its members that the FELA be interpreted and applied in a manner which implements the basic purpose of the Act--providing compensation for rail employees who are injured through the negligence or fault of their employers. Equally important to RLEA as a policy matter is the deterrent effect of the FELA, for the Act operates as a financial incentive to rail employers to provide their employees with safe places in which to work. The safer the work place, the lower the carriers' FELA costs.

Occupational diseases have always presented an issue of great concern to RLEA, especially where, as in this case, rail employers knowingly expose their employees to materials they know to be hazardous without providing effective protective gear and training. RLEA and its members have a very real and vital interest in assuring that the protection

against occupational hazards which the FELA provides to rail employees is not diluted by a narrow construction of that Act.

Letters of consent by the parties for the filing of this Brief are attached hereto.

SUMMARY OF ARGUMENT

In *Consolidated Rail Corp. v. Gottshall*, this Court, relying on the common law of tort liability, held first that emotional harm is an appropriate element of recovery under the Federal Employers' Liability Act (FELA). But in so doing, this Court also ruled that there can be no recovery for emotional harm stemming from concern for the safety of a fellow worker. In so ruling, this court rejected "bystander" liability, which, the plaintiff in *Gottshall* argued, would have permitted him to recover for such harm. Rather, this Court adopted the "zone of danger" rule, under which a person not suffering physical impact must be put to the foreseeable risk of such an impact in order to recover emotional harm damages. This Court then remanded the case for a determination of whether Gottshall satisfied this latter test.

In rejecting bystander liability for FELA purposes, this Court did not reject the "impact" test as a basis of recovery for emotional harm. This court was not called upon to consider the continued viability of the impact test, since Gottshall did not claim that he suffered any impact that would trigger liability under that test.

In the case under review, it is clear that the Respondent Buckley did suffer an impact--the massive and consistent exposure to asbestos fibers. Under the traditional common law impact rule, the plaintiff need not suffer physical harm as

a result of the impact, nor need the emotional harm be serious, although there is evidence to support the conclusion that Respondent's injury was physical, and that the emotional harm was, and continues to be, serious.

When a plaintiff has suffered an impact, it is a bit awkward to speak of the zone of danger as the test of liability. To the extent that it is ultimately concluded that this Court in *Gottshall* did develop a unitary zone of danger test of emotional harm liability, given the nature of Respondent's harm, the evidence in this case satisfies this Court's zone of danger test as well.

ARGUMENT

I. IN DETERMINING THE CIRCUMSTANCES UNDER WHICH RECOVERY OF DAMAGES FOR EMOTIONAL HARM IS APPROPRIATE UNDER THE FELA, THIS COURT HAS TURNED TO THE COMMON LAW AS THE PRIMARY SOURCE OF AUTHORITY.

While the FELA carries with it its own jurisprudence with respect to recovery for emotional harm, this Court has turned primarily to the common law. As stated in *Gottshall*:

> Because FELA is silent on the issue of negligent infliction of emotional distress, common-law principles must play a significant role in our decision.

114 S. Ct. at 2404.

For this reason, it is important to determine whether Respondent could recover under general common law tort principles.

II. THE IMPACT TEST OF LIABILITY FOR EMOTIONAL HARM REMAINS A VIABLE TEST OF LIABILITY UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

The earliest rule permitting recovery for negligently inflicted emotional harm is the "impact" rule. Under this rule, the plaintiff is entitled to recover emotional harm damages if there has been an impact.[1] The recognizable intangible harm for which recovery may be had includes, naturally enough, the physical pain and suffering associated with the impact, but it is not limited to that. Recovery may be had, for example, for the emotional harm resulting from disfigurement (see *Kravenas v. Algonquin Township*, 301 N.E.2d 490 (Ill. App. 1973)), and from loss of enjoyment of activities (see *McDougald v. Garber*, 536 N.E.2d 372 (N.Y. 1989)). The impact rule also permits recovery for fright, whether of an impending impact to the plaintiff (see *Robb v. Pennsylvania Railroad Co.*, 210 A.2d 709 (Del. 1965)), or of the later consequences to the plaintiff of an impact that has already taken place (see *Plummer v. United States*, 580 F.2d 72 (3rd Cir. 1978)).

A rule that permits recovery for such fright only when there is an impact is not a stable rule. If fright--fear of an

1. See, in general, Richard N. Pearson, Liability to Bystanders for Negligently Inflicted Emotional Harm - A Comment of the Nature of Arbitrary Rules, 34 U. Fla. L. Rev. 477, 485-488 (1982), hereinafter *Liability to Bystanders*.

impact or of its consequences--is worthy of compensation, then recovery should depend on whether there was fright, and not whether there was an impact. Courts perceived this discontinuity between the rule of liability (there must be an impact) and the rule of damages (recovery for fright) and developed the "zone of danger" test. Under this test, there may be recovery for emotional harm stemming from fright even if the plaintiff has not suffered a physical impact if the plaintiff is in the "zone of danger" of such an impact. The leading early case adopting the zone of danger rule is *Dulieu v. White & Sons*, [1901] 2 K.B. 669. The zone of danger test became the majority rule in this country,[2] although in many cases the issue was not whether someone in the zone of danger could recover, but whether someone outside the zone could. (See *Waube v. Warrington*, 258 N.W. 497 (Wis. 1935)). According to the court in *Waube*, there were two facets to the zone of danger rule: first, the plaintiff had to be in the zone of danger of physical impact, and second, the fear had to be for the plaintiff's own safety.

The most recent development in the law of recovery for emotional harm involves persons who are not in any physical danger themselves, but who suffer emotional harm as a result of a concern for the safety of others. Such a plaintiff was involved in *Waube*, and recovery was denied, even in the face of serious physical injury--in that case death. Most courts denied recovery in these "bystander" cases, for a variety of reasons, until the issue was presented to the Supreme Court of California in *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968)). The court, overturning precedent no more that five years old (see *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513

2. See 3 Fowler Harper, Fleming James, Jr., Oscar S. Gray, *The Law of Torts* 689 (2nd Ed. 1986).

(Cal. 1963)), held that under some circumstances the bystander could recover for fear for the safety of others. Whether the plaintiff could recover, the court ruled, depended on the relationship of the plaintiff to the incident involving the primary victim of the defendant's negligence. Relevant was the geographic relationship (was the plaintiff at the scene?); the temporal relationship (did the plaintiff see the threat to the primary victim's safety?) and the familial relationship (was the plaintiff closely connected to the primary victim?) Soon, many other states followed the California lead, and also expanded liability for emotional harm to include that suffered by bystanders, although the contours of the circumstances required for recovery varied somewhat from state to state. See, W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, David G. Owen, *Prosser and Keeton on The Law of Torts* 366-367 (5th Ed. 1984).

It is against this doctrinal backdrop that the plaintiff in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S. Ct. 2396 (1994), made his claim under the FELA. The plaintiff in *Gottshall* alleged that he suffered severe emotional distress caused by his witnessing the death of a co-worker. This Court, in an opinion by Justice Thomas, ruled that while emotional harm is compensable under the FELA, liability would not be extended to those outside the zone of danger. The plaintiff, not having been in that zone, could not recover.[3]

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3. The trial judge granted the Railroad's motion for summary judgment (*Gottshall v. Consolidated Rail Corp.*, 773 F. Supp. 778 (E.D. Pa. 1991). The Third Circuit reversed and remanded for trial. 988 F.2d 355 (3rd Cir. 1993). While this court rejected bystander liability, it did remand for a determination of whether the plaintiff was in the zone of danger. 114 S. Ct. at 2411. On remand, the Third Circuit ruled that the plaintiff clearly was not. *Gottshall v. Consolidated Rail Corp.*, 56 F.3d 530 (3rd Cir. 1995).

Thus, the only issue facing this Court in *Gottshall* was whether one outside the zone of danger could recover emotional harm damages. This Court did not need to, nor did it, specifically address the issue of whether the impact rule would apply in cases in which there was an impact. While the Court did state, "We agree that the zone of danger test best reconciles the concerns of the common law with the principles underlying our FELA jurisprudence." (114 S. Ct. at 2410), that statement must be read in the context in which the case arose. The contest in *Gottshall* was between the zone of danger rule and a rule which permits recovery by those not in the zone of danger. Thus, when the Court stated that the zone of danger rule "best reconciles the concerns of the common law" with those of the FELA, it did no more than choose the zone of danger rule instead of the broader liability rule. Thus, *Gottshall* does not stand for the proposition that recovery under the FELA may not also be had under the impact rule, where that rule fits the facts.

Indeed, the court in *Marchica v. Long Island Railroad Co.*, 31 F.3d 1197 (2nd Cir. 1994), *cert. denied*, 115 S. St. 727 (1995), specifically assumed that the impact rule survives *Gottshall*. And a number of courts applying the common law have also specifically ruled that the impact rule survives the more recent broader liability rules.[4] In *Champion v. Gray*, 478 So. 2d 17 (Fla. 1985), the court adopted a bystander liability rule. In *Sguros v. Biscayne Recreation Development Co.*, 528 So. 2d 376 (Fla. App. 1987), the court said that *Champion* was limited to bystander cases; if the plaintiff fears for his or her own safety, the

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4. As pointed out in Section I of this Brief, courts have turned to the common law as a source of authority under FELA.

impact rule must be satisfied. And in *Plummer v. United States*, *supra*, the Third Circuit ruled that when there is an impact, the plaintiff can recover under the impact rule and need not rely on the zone of danger rule.

Especially noteworthy in this regard is *Corgan v. Muehling*, 574 N.E.2d 602 (Ill. 1991), in which the court ruled that the zone of danger rule does not apply to cases involving "direct victims" as plaintiffs. The defendant in *Corgan* argued, as does Petitioner here, that the plaintiff failed to state a cause of action under the zone of danger rule because she failed to allege the requisites of recovery, including physical injury, established in *Rickey v. Chicago Transit Authority*, 457 N.E.2d 1 (Ill. 1983). In *Rickey*, the court ruled that one in the zone of danger of physical impact could recover absent actual impact if, among other things, physical injury or illness could be shown. But the court in *Corgan* ruled that *Rickey* and the zone of danger rule did not apply when the plaintiff did not claim recovery based on her presence within the zone of danger. If the plaintiff is a "direct victim," the court ruled, the zone of danger requirements established by *Rickey*, including that of physical injury, simply do not apply.[5]

Thus, the impact rule remains a viable basis of liability; there is certainly nothing in *Gottshall* that requires a contrary conclusion.

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5. For the same reasons, *Liability to Bystanders*, note 1, *supra*, cannot be cited in support of the proposition that the zone of danger test overrides the impact rule, as Petitioner suggests on pages 28-29 of its Brief. The author of that article, like the court in *Gottshall*, was concerned only with whether liability for negligently inflicted emotional harm should be extended to those outside the zone of danger, and not with the continued viability of the impact rule.

III. ON THE FACTS OF THE CASE UNDER REVIEW, RESPONDENT IS ENTITLED UNDER THE IMPACT RULE TO RECOVER DAMAGES FOR HIS EMOTIONAL HARM CAUSED BY HIS EXPOSURE TO ASBESTOS FIBERS.

A. RESPONDENT'S EXPOSURE TO ASBESTOS FIBERS IS SUFFICIENT TO CONSTITUTE AN IMPACT UNDER THE IMPACT RULE.

In the usual cases involving impacts which result in physical injury, we think of impacts with large objects, such as automobiles or trains--impacts that furnish the typical grist for the personal injury mill. But negligence cases do not exclusively involve impacts with large objects. Small objects, such as bullets, also suffice.

In the case under review, Respondent was impacted with asbestos fibers to the point that he, and his co-workers, were called the "snowmen of Grand Central." *Buckley v. Metro-North Commuter Railroad*, 79 F.3d 1337, 1340 (2nd Cir.), *cert. granted* 117 S. Ct. 379 (1996). Impact with smaller particles than asbestos fibers have been held to be sufficient to satisfy the rule. In *Deutsch v. Shein*, 597 S.W.2d 141 (Ky. 1980), for example, the court ruled that the plaintiff's exposure to x-rays was a "physical contact" for the purposes of recovery of emotional harm damages. In *Laxton v. Orkin Exterminating Co., Inc.*, 639 S.W.2d 431 (Tenn. 1982), the plaintiffs drank water that had been contaminated with chlordane used by the defendant for termite eradication. The court upheld a jury instruction that the ingestion of "any amount of the toxic substance ... is at least a technical physical injury" justifying emotional harm damages. 669

S.W.2d at 434. In *Laxton*, as in *Deutsch*, it is clear that the reference is to "impact" and not to some demonstrable physical injury, since the court recognized that the plaintiff had not proved any such physical injury. To the same effect is *Plummer v. United States*, *supra*, in which the court ruled that exposure to tuberculosis bacilli satisfies the requirement of an impact.

In a different context, it was held that particulate matter from a factory that fell on the plaintiff's land was a physical invasion of the land for trespass purposes. See *Martin v. Reynolds Metals Co.*, 342 P.2d 790 (Ore. 1959), *cert. denied*, 362 U.S. 918 (1960).

That impact with small particles satisfies the impact requirement is consistent with the rule that any impact, no matter how slight, is sufficient. See *Warren v. Boston & M. R.R.*, 40 N.E. 895 (Mass. 1895). Although given the extent of the impact in the case under review, it can hardly be characterized as "slight."

Thus, this case satisfies the threshold requirement of the impact rule that there be an impact.

B. UNDER GENERAL COMMON LAW PRINCIPLES, ONCE THE PLAINTIFF HAS SATISFIED THE REQUIREMENT OF AN IMPACT, NO FURTHER SHOWING OF PHYSICAL HARM OR INJURY IS NECESSARY FOR RECOVERY OF DAMAGES FOR EMOTIONAL HARM.

While the history of recovery for intangible harm in negligence cases is not clear, some early American cases

limited recovery to that caused by the physical pain associated with a physical injury. See *Illinois & St. Louis R.R. Co. v. Stables*, 62 Ill. 313 (1872); *Johnson v. Wells, Fargo & Co.*, 6 Nev. 558 (1887). And then, as now, there was no requirement that the pain and suffering itself cause additional physical harm.

Eventually, courts began to recognize other elements of intangible harm, including fright, as appropriate elements of recovery in personal injury cases. See *Liability to Bystanders*, note 1, *supra*, at 487. Because fright-caused emotional harm was included with pain and suffering as appropriate for recovery, there was no requirement that the plaintiff suffer any injury other than the impact to recover fright damages. And the early cases so held, without much discussion. See, e.g., *Porter v. Delaware, L. & W. R. Co.*, 63 Atl. 860 (N.J. 1906):

> The proof by the plaintiff was that she was hit on the neck by something, and that dust from the falling debris went into her eyes. Proof of either of these physical injuries would take the case out of the rule as to nonrecovery for fright alone.

It is clear that the reference by the court to "physical injuries" is to "physical impacts." There is nothing in the case to suggest any physical injury other than the impacts referred to. See also *Warren v. Boston & M. R.R. Co.*, *supra* (slight impact sufficient to satisfy impact rule, and no allegation of physical injury as a result of the impact).

Later cases applying the impact rule also have held that no independent physical injury is required for recovery. In *Laxton v. Orkin Exterminating Co., Inc.*, *supra*, for example,

the plaintiffs drank water that had been contaminated with chlordane by the defendant's anti-termite treatment. The court held that the ingestion of the chlordane was sufficient to satisfy the impact requirement, and for that reason the plaintiffs could recover for fear caused by the exposure to chlordane with no further proof of physical injury. Recovery was permitted even though "the mental health of the [plaintiffs] did not evidence itself in any physical way. Neither was it severe enough to require medical treatment." 639 S.W.2d at 433. Other modern impact cases in which the courts have ruled that physical injury beyond the impact is not necessary to recovery for emotional harm include *Marriott v. Sedco Forex International Resources, Ltd.*, 827 F. Supp. 59 (D. Mass. 1993); *Plummer v. United States*, *supra*; and *Deutsch v. Shein*, *supra*.

C. UNDER GENERAL COMMON LAW PRINCIPLES, ONCE THE REQUIREMENT OF AN IMPACT IS SATISFIED, THE PLAINTIFF NEED MAKE NO FURTHER SHOWING THAT THE EMOTIONAL HARM IS SEVERE.

As indicated in the preceding section, damages for emotional harm stemming from fright became part of the damages generally available, along with damages for physical pain and suffering. Since no particular showing of severity of harm caused by the physical pain of an injury was required, neither was a showing of severity required in connection with the other elements of intangible harm for which recovery was available. See *Warren v. Boston & M. R.R. Co.*, *supra*; *Christy Bros. Circus v. Turnage*, 144 S.E.

680 (Ga. App. 1928).[6] Consistent with this, more recent cases also have refused to impose a threshold requirement of severity. See, e.g., *Binns v. Fredenall*, 513 N.E.2d 278 (Ohio 1987).

IV. EVEN UNDER THE ZONE OF DANGER TEST AS ADOPTED BY THIS COURT IN *GOTTSHALL*, RESPONDENT IS ENTITLED TO RECOVER DAMAGES FOR HIS EMOTIONAL HARM.

While it is difficult to conceptualize applying the zone of danger test to a case in which there has been an actual impact,[7] Petitioner argues that *Gottshall* established a unitary test--the zone of danger rule--of recovery of emotional harm damages. The consequence of that unitary test, the Petitioner argues in its Brief, is that to recover for emotional harm under the FELA, a plaintiff must establish that the emotional harm itself triggered a physical injury, that the emotional harm be severe, and that the fear be of "imminent physical harm." However, none of these are requirements for recovery under the zone of danger rule.

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6. In *Ob-Gyn Associates of Albany v. Littleton*, 386 S.E.2d 146 (Ga. 1989), the court modified the Georgia impact rule to require physical harm for emotional harm recovery.

7. The zone of danger test might, of course, serve to limit liability of a negligent defendant even if there is an impact; the plaintiff must prove that the impact was a foreseeable consequence of the defendant's negligence. The still-leading case is *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928). There is no question in the case under review here, however, that the impact suffered by Respondent was foreseeable to Petitioner--indeed, it was certain to occur.

A. UNDER THE ZONE OF DANGER TEST, THERE IS NO REQUIREMENT THAT THE EMOTIONAL HARM BE MANIFESTED BY PHYSICAL INJURY.

While it is true that some courts have required a physical manifestation or injury resulting from emotional harm when the basis of liability has been the zone of danger rule, many courts have held that there should be no such requirement. The leading case rejecting a physical harm requirement in negligently inflicted emotional harm cases is *Molien v. Kaiser Foundation Hospitals*, 616 P.2d 813 (Cal. 1980). The court felt that the requirement is both overinclusive and underinclusive: overinclusive because physical injury would not necessarily mean that the plaintiff deserves compensation, and underinclusive because some plaintiffs otherwise deserving of compensation would be denied it. As to the latter, the court stated:

> More significantly, the classification is underinclusive because it mechanically denies court access to claims that may well be valid and could be proved if the plaintiffs were permitted to go to trial.

616 P.2d at 820.

The Supreme Court of California was also concerned with the ability of plaintiffs to fabricate the existence of physical harm just for the purpose of achieving their primary goal of emotional harm damages: "[I]t encourages extravagant pleading and distorted testimony." 616 P.2d at 820. In summary, the court concluded:

> In our view of [sic] the attempted distinction between physical and psychological injury merely clouds the issue. The essential question is one of proof; whether the plaintiff has suffered a serious and compensable injury should not turn of this artificial and often arbitrary classification scheme.

616 P.2d at 821.

Later cases that have adopted the zone of danger rule also reflect the concern of *Molien* with the unfairness and unworkability of the physical injury requirement. In *Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315, *modified on denial of rehearing en banc*, 797 F.2d 256 (5th Cir. 1986), the court, after ruling that neither impact nor "physical manifestations" of emotional harm are necessary to determine the genuineness of the claim, stated:

> We believe the courts have better devices with which to choose between the worthy and the unworthy.... With or without physical injury, a plaintiff is entitled to recover damages for serious mental distress arising from fear of developing cancer where his fear is reasonable and causally related to the defendant's negligence. The circumstances surrounding the fear-inducing occurrence may themselves supply sufficient indicia of genuineness. It is for the jury to decide questions such as the existence, severity and reasonableness of the fear.

788 F.2d at 318. See also *Anselmi v. Penrod Drilling Corp.*, 813 F. Supp. 436 (E.D. La. 1993), in which the court permitted a plaintiff in the zone of danger to recover absent physical injury caused by the plaintiff's emotional harm.

A number of courts have not required independent physical injury even in bystander liability cases, cases in which it might be expected that courts would be particularly concerned with limiting emotional harm liability. In *Gates v. Richardson*, 719 P.2d 193 (Wyo. 1986), the court rejected a physical injury requirement for bystander liability, stating:

> One purpose of a damage limitation is the prevention of fraudulent claims. But, given the restrictions we have imposed upon the cause of action, we do not perceive a need for further limitation upon damages. If the first three limitations are satisfied[8] we can be quite sure that the cause of action is within the realm of legitimacy. A further limit on damages is more likely to hurt a deserving plaintiff than it is to defeat a meritless claim. The rule we adopt provides that once an injured party has established duty, breach and proximate cause, he will be compensated for his entire damage so that he is made whole.

719 P.2d at 200. See also *James v. Lieb*, 375 N.W.2d 109, 116 (Neb. 1985): "While physical manifestation of the psychological injury may be highly persuasive, such proof is not necessary given the recent state of medical science and

8. The reference here is to the three factors set out in *Dillon v. Legg*, *supra*, as relevant to bystander recovery. (Author's footnote.)

advances in psychology."; *Folz v. State*, 797 P.2d 246 (N.M. 1990); *Culbert v. Sampson's Supermarkets, Inc.*, 444 A.2d 433 (Me. 1982).

A requirement of physical manifestation has also been rejected in other contexts. In *St. Elizabeth Hospital v. Garrard*, 730 S.W.2d 649 (Tex. 1987), the plaintiff's claim for emotional harm was based on negligent mishandling of a corpse--in this case a miscarried fetus. The court, relying on *Molien v. Kaiser Foundation Hospitals*, *supra*, stated that the physical injury requirement was both underinclusive and overinclusive, and also echoed *Molien*'s concern with "extravagant pleading and distorted testimony." "The problem is one of proof," the court stated, "and to deny a remedy in all cases because some claims may be false leads to arbitrary results which do not serve the best interests of the public. Jurors are best suited to determine whether and to what extent the defendant's conduct caused compensable mental anguish by referring to their own experience." 730 S.W.2d at 654. See also *Johnson v. Supersave Markets, Inc.*, 686 P.2d 209, 213 (Mont. 1984):

> This court adopts the species of case approach which requires a factual analysis of each case to determine whether the alleged "emotional distress" merits compensation. In determining whether the distress is compensable absent a showing of physical or mental injury, we will look to whether tortious conduct results in a *substantial* invasion of a legally protected interest and causes a *significant* impact upon the person of the plaintiff.

There is no question that in the case under review, the invasion of Respondent's "legally protected interest" was "substantial" and that the impact upon Respondent's person was "significant."

Finally, many courts responding to a felt need to provide compensation in deserving cases, have made it difficult to distinguish between physical injury and emotional harm. These cases rarely involve the typical physical injury in negligence cases--the broken bone and the punctured skin. Rather, the types of injuries are much more subtle, and the line between the emotional and physical is a wavering line at best. Courts have been called upon to determine whether a variety of manifestations are sufficiently physical to satisfy the requirement. For example, in *Toms v. McConnell*, 207 N.W.2d 140 (Mich. App. 1973), the court ruled that the physical harm requirement was satisfied by proof that the plaintiff "has withdrawn from normal socialization, was for a period of nine months following the accident unable to function as she did previously, and continues in a state of depression." 207 N.W. 2d at 145. And in *Garrett v. City of New Berlin*, 362 N.W.2d 137 (Wis. 1985), hysteria at the scene of the accident, according to the court, satisfied the physical harm criteria. Other cases ruling that the plaintiff suffered physical injury include *Robb v. Pennsylvania Railroad Co.*, *supra* (cessation of lactation); and *Towns v. Anderson*, 579 P.2d 1163 (Colo. 1978) ("nightmares, sleepwalking, nervousness and irritability"). With cases like these, the line between physical and mental injury is too evanescent to function as a line between those cases in which the plaintiff should be able recover for emotional harm and those in which the plaintiff should not.

B. UNDER THE ZONE OF DANGER TEST, THERE IS NO REQUIREMENT THAT EMOTIONAL HARM BE SEVERE TO BE COMPENSABLE.

Although some cases applying the zone of danger test of emotional harm recovery do mention that the harm must be severe, many others do not, and, as will be seen, an independent severity requirement is inconsistent with this Court's opinion in *Gottshall*. *Hagerty v. L & L Marine Services* and *Anselmi v. Penrod Drilling Corp.*, both discussed *supra* in connection with the physical injury requirement, and both adopting the zone of danger rule, rejected any threshold proof of severity of the emotional harm. *Anselmi* involved emotional harm suffered by an oil rigger, and is particularly instructive. In rejecting a severity requirement, the court observed:

> While this Court is well aware of the case lore that characterizes seamen as a hearty breed, one would imagine that a severe explosion on a rig in the middle of the Gulf at 3 a.m. would shake the fibre of the heartiest of men.... Whether the plaintiff's frightened reaction to the incident is a reasonably foreseeable consequence of the defendant's negligence, however, is a question for the jury and cannot be dealt with summarily by invoking the machismo of seamen.

813 F. Supp. at 443. Even some courts adopting a bystander recovery rule have rejected a severity requirement. *See, e.g.*, *Gates v. Richardson*, *supra*. And, it follows, that if there is no threshold severity requirement, there need be no medical

or psychiatric testimony supporting the claim of the plaintiff. See *Folz v. State*, *supra*.

Many of the courts that have suggested that there is a severity requirement have defined "severity" in a way that makes it in most cases a jury issue. In *Culbert v. Sampson's Supermarkets, Inc.*, *supra*, the court in adopting bystander liability, said that the emotional harm suffered by the plaintiff must be serious. In defining what is serious, the court relied on and quoted Hawaii cases, one of which was *Rodrigues v. State*, 472 P.2d 509 (Haw. 1970), in which the court said:

> We hold that serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.

472 P.2d at 520. In *Rodrigues*, the plaintiffs were able to recover for the emotional harm caused by the physical damage negligently caused by the defendant to their home.[9]

Furthermore, and more tellingly, a threshold requirement of severity is directly contrary to the reasoning of this Court in *Gottshall*. The Third Circuit's opinion in that case rejected any doctrinal barriers to recovery, asserting that the issue is whether there is "a threshold assurance that there is a likelihood of genuine and serious emotional injury." 988

9. While many courts perhaps would not follow *Rodrigues* in permitting emotional harm recovery for damage to property, some do, even in breach of contract cases. See, e.g., *B & M Homes, Inc. v. Hogan*, 376 So. 2d 667 (Ala. 1979) (sale of new house); *Volkswagen of America, Inc. v. Dillard*, 579 So. 2d 1301 (Ala. 1991) (sale of new automobile).

F.2d at 371. This Court specifically rejected this as a threshold screening device:

> Such a fact-specific test, moreover, would be bound to lead to haphazard results. Judges would be forced to make highly subjective determinations concerning the authenticity of claims for emotional injury, which are far less susceptible to objective medical proof than are their physical counterparts. To the extent that the genuineness test could limit potential liability, it could do so only inconsistently.

114 S. Ct. at 2409.[10] Once the plaintiff is within the zone of danger, there is no further doctrinal barrier to recovery related to the severity of the injury. Of course, the jury in its discretion could make the determination that a given

10. See also Pearson, *Liability to Bystanders*, note 1, *supra*, at 511:

> It is difficult to imagine how a set of rules could be developed and applied on a case-by-case basis to distinguish severe from nonsevere emotional harm. Severity is not an either/or proposition; it is rather a matter of degree. Thus, any attempt to formulate a general rule would almost inevitably result in a threshold requirement of severity so high that only a handful would meet it, or so low that it would be an ineffective screen. A middle-ground rule would be doomed, for it would call upon courts to distinguish between large numbers of cases factually too similar to warrant different treatment. Such a rule would, of course, be arbitrary in its application.

An example of a court setting a very low, to the point of disappearing, severity threshold for emotional harm recovery is *Campbell v. Animal Quarantine Station*, 632 P.2d 1066 (Haw. 1981). Although Hawaii purports to have adopted a severity requirement, in *Campbell* five family members were permitted to recover a total of $1000 in emotional harm damages caused by the death of the family dog.

emotional harm is not so severe as to justify compensation, as many courts have recognized. See *Hagerty v. L & L Marine Services, Inc.*, *supra*, 788 F.2d at 318; *Anselmi v. Penrod Drilling Corp.*, *supra*, 813 F. Supp. at 443; *Marriott v. Sedco Forex International Resources, Ltd.*, *supra*, 827 F. Supp. at 76; *St. Elizabeth Hospital v. Garrard*, *supra*, 731 S.W.2d at 654.

In any event, there is ample objective evidence of the seriousness of Respondent's emotional harm in the case under review. The massiveness of the exposure of Respondent to asbestos fibers, and the significant increase in Respondent's risk of dying from cancer (*Buckley v. Metro-North*, *supra*, 79 F.3d at 1341) would generate extreme fear in all but the most foolhardy. That he had not sought psychiatric counselling certainly does not undercut the seriousness of Respondent's emotional harm. In Respondent's words, what "is a psychiatrist going to do for me? What is he going to tell me? I am not going to die? Is he going to tell me not to worry about it?" 79 F.3d at 1341.

C. UNDER THE ZONE OF DANGER RULE, THE FEAR OF THE PLAINTIFF NEED NOT BE OF AN IMMEDIATE PHYSICAL CONSEQUENCE.

The importance of keeping the impact rule separate conceptually from the zone of danger rule is made clear by Petitioner's argument that the zone of danger rule requires that Respondent's fear relate to "imminent physical injury." Brief of Petitioner at 22. Thus, the argument goes, Respondent cannot recover in this case because the fear relates to physical injury that may occur sometime in the future. With this bit of conceptual slight-of-hand, Petitioner

attempts to convert the factual description of most zone of danger cases into a requirement attaching to cases where there has been an actual impact.

What the zone of danger rule requires is that the plaintiff be in the zone of foreseeable risk of *impact* created by the defendant's negligence. And there is no question that in the vast bulk of zone of danger cases, the fear of the plaintiff relates to an immediate impact. If the threat of the impact is not immediate, it can be supposed that the plaintiff would have taken steps to escape from the zone of danger. And given the nature of the harm claimed by the plaintiff--fear of impact--it is logical that the consequences of the impact that the plaintiff fears will also be immediate. It would be possible, perhaps, to conjure up a case where there is fear of immediate impact but the consequences of the impact, if it does take place, are some time in the future. Would there be liability under the zone of danger rule if no impact had actually taken place? While that question might furnish grist for a first year Torts examination, it need not be answered here. In this case, and this is the point Petitioner slides over in trying to conflate the two tests, *there was an actual impact*. Even in actual impact cases, the most common fact pattern is that the impact causes immediate harm, but that certainly need not be the case. There are many cases, some of which are cited in Petitioner's brief, which do not make fear of "imminent" consequences a requisite for recovery if there has been an impact. See, e.g., *Lavelle v. Owens-Corning Fiberglas Corp.*, 507 N.E. 476 (Ohio Ct. C.P. 1987); *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563 (D. Haw. 1990); *Plummer v. United States*, *supra*, (exposure to tuberculosis bacilli); *Marchica v. Long Island Railroad*, *supra* (exposure to AIDS). Other cases include *Madrid v. Lincoln County Medical Center*, 923 P.2d 1154

(N.M. 1996) (exposure to AIDS); *Marriott v. Sedco Forex International Resources, Ltd.*, *supra* (exposure to HIV).

Following Petitioner's argument to its logical conclusion, Respondent could not recover for fear of future cancer even if the medical testimony were that the chances that Respondent would develop cancer sometime in the future exceeded fifty percent.

V. TO THE EXTENT THAT THIS COURT IS CONCERNED WITH UNLIMITED LITIGATION AND LIABILITY, THIS CASE DOES NOT PRESENT THAT PROBLEM.

This brief does not argue that every trivial exposure to asbestos generating some concern for future harm should be actionable. To some extent, of course, given the nature of the torts process, with its contingent fee system, the truly trivial case is not likely to be pursued. But courts have developed safeguards in toxic cases which are likely to screen out whatever trivial cases would otherwise get through.

In asbestos cases particularly, courts have focused on the nature of the exposure, and thus, for example, have denied recovery by wives of men who worked with asbestos (the wives alleged that they were exposed to asbestos fibers on clothes their husbands brought home). In these cases, the impact, if any, is generally too slight to generate a reasonable fear. See *Deleski v. Raymark Industries, Inc.*, 819 F.2d 377 (3rd Cir. 1987); *Mergenthaler v. Asbestos Corp. of America*, 480 A.2d 647 (Del. Super. 1984). See also *Redland Soccer Club, Inc. v. Department of the Army*, 55 F.3d 827 (3rd Cir. 1995) (absent actual impact, generalized fear of exposure to toxic wastes not actionable).

The contrast between the facts of these cases and the case under review is stark. Respondent's fear of future cancer does not stem from some general concern following a minor exposure; rather the exposure was "massive" and was sustained over a period of years. While it may be true that in many cases, the "temporary emotion of fright, so far from serious that it does no physical harm, is so evanescent a thing, so easily counterfeited, and usually so trivial,"[11] that certainly does not describe the facts of this case. This is not a case of a plaintiff seeking to recover for a frightening near miss during a long commute on a busy highway--a scare that most of us have suffered, perhaps too frequently. There is nothing temporary, evanescent, counterfeit or trivial about what has happened to "the snowmen of Grand Central" in this case.

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11. *Prosser and Keeton, supra*, at 361.

CONCLUSION

For these reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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